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CONSTITUTIONAL LAW—DIVORCE. *Andrews* v. *Andrews*, 188 U. S. 14 (1903).—The latest development in the American divorce law is the decision of the United States Supreme Court in upholding the constitutionality of the Massachusetts Statute aimed at what are popularly called "Dakota Divorces." On the surface, the decision of *Andrews* v. *Andrews* appears to be a step in advance in divorce law, permitting one state to protect itself from the loose laws of another state. Unfortunately, however, this is not the case. The law remains the same as it was by the weight of state authority before the declaration of the Supreme Court. The decision, however, may be valuable in its tendency to bring the New York and the two Carolina Courts into harmony with the other states on the divorce question.

The facts of *Andrews* v. *Andrews* are briefly these: A and B, citizens of Massachusetts domiciled in Boston, were mar-

ried in that city in 1887 and continued to reside there after their marriage. In 1891 A went to South Dakota to secure a divorce upon grounds not deemed adequate under the laws of Massachusetts, remaining there a sufficient time to acquire a residence under the South Dakota law before filing his petition for a divorce. The lower court found that he intended to return to Massachusetts, when the divorce was granted, and that he had no other business in South Dakota than the prosecution of the divorce; that he voted at an election in South Dakota and his intention was to become a resident for the purpose of obtaining a divorce, and to that end became as a matter of law a resident there. A and B never lived as husband and wife in South Dakota, but the wife appeared by counsel and a divorce was granted, the wife consenting to the divorce, upon an agreement being effected between the parties. A then returned to Massachusetts, married C, and was there domiciled until his death. Upon A's death, both B and C sought the aid of the court, each asserting her right to administer the estate as A's lawful widow.

The Massachusetts Court held that the divorce obtained in South Dakota was void under their statute—"A divorce decreed in another state or country according to the laws thereof by a court having jurisdiction of the cause and of both parties shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another state or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." Sec. 352 Rev. Laws Mass. 1902, ch. 152, p. 1357. The case was appealed to the Supreme Court, the single question being the constitutionality of the Massachusetts statute. There were two objections urged against the act: first, that the state had no power to legislate on the subject of divorce, and, second, admitting such power to exist, this particular exercise was in direct violation of the "full faith and credit" clause of the Constitution of the United States.

That the question of marriage and divorce is a subject of state legislation is now undisputed. "Marriage," says Justice Field in *Maynard* v. *Hill,* 125 U. S. 190 (1887), "as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. The body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects

upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." The argument which denies this right to the state assumes that marriage is a civil contract and as such is under the protection of the 10th section of Article 1 of the constitution, that "No state shall . . . . pass any law impairing the obligation of contracts." Although marriage is a contract, it is not such a contract within the contemplation of this clause of the constitution, and the courts have held that whether the divorce be granted by virtue of a general act of assembly or directly by special dispensation of the legislature, the divorce is valid. *Cronise* v. *Cronise,* 54 Pa. 225 (1867); *Maguire* v. *Maguire,* 7 Dana 181 (1838); *Carson* v. *Carson,* 40 Miss. 349 (1866); *Maynard* v. *Hill, supra.*

"The clause in the constitution respecting the obligation of contracts has never been understood to restrict the general right of the legislature on the subject of divorces." Chief Justice Marshall in *Dartmouth College* v. *Woodward,* 4 Wheat. 518 (1819); *Adams* v. *Palmer,* 51 Me. 480 (1863).

Some of the courts, as in *Clark* v. *Clark,* 10 N. H. 380 (1839), and *Bingham* v. *Miller,* 17 Ohio 445 (1843), denied the authority of the legislature to grant divorces by special legislation, alleging that the granting of a divorce was a judicial power and could not be exercised by the legislature, but the Supreme Court in *Maynard* v. *Hill, supra,* declared that divorces so granted were valid, though many of the states have now by provisions of their constitutions prohibited such legislative divorces. In deciding in favor of the state's right to legislate, Justice White in *Andrews* v. *Andrews* says, "The statute was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the state of Massachusetts to legislation over a subject inherently domestic in its nature and upon which the existence of civilized society depends."

After upholding the state's right to legislate on the divorce question in general, about which there was no serious doubt, the court proceeded to the real point of the case,—did Massachusetts, in violation of the constitution, fail to give "full faith and credit" to the judicial act of South Dakota? The court said not. "The statute is directed not against divorces obtained in other states as to persons domiciled there, but against the execution in Massachusetts of decrees of divorce obtained in other states by persons who are domiciled in Massachusetts and who go into such other states with the purpose of practising a fraud upon the laws of the state of their domicil; that is to procure a divorce without obtaining a bona

fide domicil in such other state." Whatever may have been the purpose of the legislature in enacting this statute, or whether a fraud was being practised on the state of Massachusetts, is immaterial in considering its constitutionality. If the decree of South Dakota is such a decision as demands full faith and credit under the constitution, clearly the Massachusetts statute is unconstitutional, although, as Justice White says, the inevitable result of such a doctrine "would be the destruction of substantial legislative power over the subject of the dissolution of the marriage tie, for a man could, without acquiring a bona fide domicil therein, obtain a divorce and compel the state of the domicil to give full faith to the divorce thus fraudulently obtained. Since the Constitution of the United States confers no power on the government to regulate marriage, it would be that the governments, state and federal, are bereft by the Constitution of the United States of a power which must belong to and somewhere reside in every civilized government."

The gist of the numerous decisions on the interpretation of the "full faith and credit" clause has been summarized by Story in his "Constitutional Law:" "They intended to give to them full faith and credit,—that is, to attribute to them positive and absolute verity,—so that they cannot be contradicted or the truth of them denied, any more than in the state where they originated. The evils of introducing a general system of re-examination of the judicial proceedings of other states, whose connections are so intimate and whose rights are so interwoven with our own, would far outweigh any supposed benefits from an imagined superior justice in a few cases." *Green* v. *Sarmiento,* 1 Peters, Cir. Rep. 74 (1810); *Hitchcock* v. *Aiken,* 1 Caines Rep. 462 (1803); *Commonwealth* v. *Green,* 17 Mass. 514 (1822).

On the other hand, to guard against fraudulent and unauthorized judicial acts of other states, the clause has been uniformly interpreted to mean that full faith and credit are to be given to a judicial act only when the court rendering such decision has jurisdiction of the cause and parties and judgment was obtained without fraud on the court. The law is clearly stated by Justice Gray in the late case of *Wisconsin* v. *Pelican Insurance Co.,* 121 U. S. 265 (1888). "These provisions (referring to the constitutional acts) establish a rule of evidence rather than of jurisdiction. While they make the record of a judgment rendered after due notice in one state, conclusive evidence in the courts of another state, or of the United States, of the matter adjudged, they do not affect the jurisdiction, either of the court in which the judgment is rendered or of

the court in which it is offered in evidence." *Thompson* v. *Whitman,* 18 Wall, 457 (1874); *Bissell* v. *Briggs,* 9 Mass. 462 (1812); *Harris* v. *Hardemann,* 14 How. 334 (1852); *Thorman* v. *Frame,* 176 U. S. 350 (1899). See also the late cases of *Johnson* v. *Insurance Co.,* 187 U. S. 491 (1902); *Hale* v. *Allison,* 188 U. S. 56 (1902); *Finney* v. *Guy,* 189 U. S. 335 (1902).

If, therefore, this statute is to be upheld, it must be upon the ground that the court of South Dakota had no jurisdiction, and this in fact is the position of *Andrews* v. *Andrews.* But did the South Dakota Court have jurisdiction? Before answering this question specifically it will be first necessary to determine what the nature of a divorce proceeding is and upon what, the jurisdiction in such cases depends. With the exception of the courts of New York and the two Carolinas, the states have held that a proceeding in divorce is one in rem, and not in personam. It is immaterial, therefore, whether one of the parties is out of the jurisdiction, and is reached only by constructive service, for the state has the power to regulate the status of the one residing therein. This doctrine is denied in New York, where the courts contend that there can be no proceeding in rem and that no court has power to grant by constructive service, unless both parties are domiciled in the state. Such is the decision in *People* v. *Baker,* 76 N. Y. 78 (1879); *O'Dea* v. *O'Dea,* 101 N. Y. 23 (1886); *Williams* v. *Williams,* 130 N. Y. 193 (1891); *McCreery* v. *Davis,* 44 S. Car. 195 (1894); *Irby* v. *Wilson,* 1 Dev. and Bat. Eq. (N. Car.) 568 (1837); and where the parties appear in a proceeding in another state, although that court has no jurisdiction according to the majority view, the decree has been declared valid in New York. In *Jones* v. *Jones,* 108 N. Y. 415 (1888), where there was a proceeding in Texas in which the defendant appeared, the court said, "The judgment of the Texas court became and is a binding adjudication on the defendant therein for the reason that the defendant by going to Texas and filing an answer to the action, became bound by the statute law of the state prescribing the effect of that proceeding, and that by the Texas law the filing of an answer by a defendant is an appearance and submission to the jurisdiction."

The effect of this alarming doctrine was just what the other courts sought to avoid, for it afforded the opportunity to the parties to go outside their own state and by mere appearance, accompanied by nominal residence for the statutory period, obtain a divorce in defraud of their own state laws. The New York courts have gone so far that they have held a man guilty of bigamy where his wife obtained

a divorce in another state upon constructive service upon the defendant, *People* v. *Baker, supra,* though the court admitted that the status of the party in the state where the divorce was obtained may be adjudged by that state, but that it could not affect the matrimonial relation of the defendant in another state, apparently a refusal without an attempt at justification, to give full faith and credit to decision of a sister state, which it acknowledged was binding in the state where it was rendered.

It was this position of the New York courts, that jurisdiction depends upon the appearance of the parties, that was urged in *Andrews* v. *Andrews,* and from the fact that the parties appeared in the action it was contended that thereby South Dakota gained jurisdiction and that Massachusetts was bound to recognize the divorce; but the Supreme Court was committed to the position that a decree of divorce was a judgment in rem, and the acceptance of such a doctrine would in effect cause the overruling of the late case of *Atherton* v. *Atherton,* 181 U. S. 155 (1900), and a repudiation of the principles in *Bell* v. *Bell,* 181 U. S. 175 (1900), and *Streitwolf* v. *Streitwolf,* 181 U. S. 179 (1900).

In *Atherton* v. *Atherton* the facts were these: A was a resident of Kentucky and had always lived there. He married B in New York and took her to Kentucky, where they resided together until 1891, when the wife went back to New York. A obtained a divorce, process being served on the wife by mailing it to her address in pursuance of the laws of Kentucky. In New York the wife began an action for a limited divorce and the question then arose as to the validity of the Kentucky divorce. The New York Court, following their former decisions, held that the divorce was not binding in New York. The Supreme Court of the United States, in reversing this decision, held that the domicil being in Kentucky the courts of that state had jurisdiction over the subject matter and the decree was entitled to full faith and credit although the wife was only constructively served. In the same year came the decisions in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf, supra,* leaving no doubt as to a divorce being a proceeding in rem and jurisdiction a question of domicil, as far as the United States Supreme Court was concerned.

It must be remembered, however, that domicil is not mere residence. "There is a broad distinction between a legal and an actual residence. A legal residence (domicil) cannot in the nature of things co-exist in the same person in two states or countries. . . . His legal residence consists of fact and intention; both must concur, and when his legal residence is once fixed, it requires both fact and intention to change it."

Tipton v. *Tipton,* 87 Ky. 243 (1888). While the various state divorce statutes speak of residence, the Supreme Court of the United States and the state courts interpret residence to mean both domicil and residence. *People* v. *Smith,* 13 Hun. (N. Y.) 414 (1878); *Bell* v. *Bell, supra; Streitwolf* v. *Streitwolf, supra; Tipton* v. *Tipton, supra; Briggs* v. *Briggs,* 5 Prob. Div. 163 (Eng.), (1879); *Hopkins* v. *Hopkins,* 35 N. H. 474 (1857).

"No mere pretence of residence, no passing visit, no temporary presence, no assumption of residence here *pro hac vice* only, nothing short of actual abode here, with intention of permanent residence, will fill the letter or the spirit of the statute." *Dutcher* v. *Dutcher,* 39 Wis. 651 (1876). Precisely the state of facts before the court in *Andrews* v. *Andrews,* uniformly held not sufficient by the state courts; *Neff* v. *Beauchamp,* 74 Iowa, 92 (1887); *Way* v. *Way,* 64 Ill. 406 (1872); *Smith* v. *Smith,* 75 N. W. R. (N. D.) 783 (1898); *Whitcomb* v. *Whitcomb,* 46 Iowa, 437 (1877); *Gregory* v. *Gregory,* 76 Me. 535 (1884), under statute similar to that of Massachusetts; *Commonwealth* v. *Ainsworth,* 6 Pa. Dis. Rep. 707 (1897); *Dunham* v. *Dunham,* 162 Ill. 589 (1896); *Brown* v. *Brown,* 14 N. J. Eq. 78 (1861). The English law is in accord with this position. *Shaw* v. *Gould,* L. R. 3 H. L. 55 (1868). In other words, irrespective of the Massachusetts statute, this divorce was not entitled to recognition. The legislature simply codified the decisions of its own and the other state courts.

Although *Andrews* v. *Andrews* finally settles the law in some respects, there is still much need of remedial legislation. As the law now stands, it is in the power of one court to declare "Dakota divorces" void as without jurisdiction, and should the matter subsequently arise in another state, which case is not beyond probability, the same question confronts the court, is it bound to give full faith and credit to the state of original jurisdiction or must it recognize the later decision declaring it void, or must it inquire into the jurisdiction itself?

The problem is still difficult and, as is the opinion of eminent jurists, one which can only be solved by either amending the constitution or having the legislatures of the various states concur in identical divorce laws, an ideal situation yet to be accomplished in American history.

M. B. S.